The Solitude of European Law Made in Germany

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Daniel Thym Do 29 Mai 2014

Fifty years ago, FIDE was an influential forum. Discussions at the biannual meetings of the International Federation for European Law and personal contacts among participants were instrumental in the shaping of the European legal order. In his widely acclaimed analysis, the French sociologist Antoine Vauchez, writing in English, has demonstrated how ideas and networks forged at the 1963 FIDE meeting had a direct bearing upon the outcome and interpretation of the seminal *van Gend en Loos* and *Costa/ENEL* judgments. This year's FIDE congress on 28-31 May 2014 in Copenhagen will be a much more mundane event. The former glory has faded, and the registration fee of more than 500 EUR, excluding accommodation, may be an insurmountable hurdle for most academics.

This blogpost originates in an argument which came about within the German delegation earlier this year. Christoph Schönberger, who had been entrusted to write the national report on EU citizenship, invited me to join forces and I agreed without hesitation. Our joint effort proceeded smoothly and we produced our report just in time. It was well received by the general rapporteurs (note that it is a report about domestic developments only subject to strict page limits, not a fully-fledged academic analysis).

German FIDE representatives informed us, though, that our report was not eligible for official FIDE purposes and would be treated as an informal 'working paper'. Their concern was politico-linguistic: national reports from Germany should be submitted and published in German. English language contributions, like ours, would not be permitted. Since we had always planned to produce an additional German version, it was duly sent in some days later. The informal English 'working paper' is available on my website.

It is not my intention to engage in a public debate about the merits and context of our disagreement with the German FIDE representatives. I hold them in high regard and admire their long-standing commitment to European law – both in Germany and beyond. I also understand that multilingualism is a sensitive and contested topic within FIDE and any other international academic forum and that those who uphold the merits of multilingualism deserve our support. I will use this episode as an occasion, however, to discuss the interaction between national and transnational debates. I learnt during recent events, how much this issue relates to the essence of my own academic identity. This blogpost is an invitation to discuss these matters openly.

Changing Times: Multilingualism in 1961 and 2014

Times change and so does the social context. At the time of the first FIDE congress in 1961, it was a natural choice to choose the French acronym FIDE, for *Fédération Internationale pour le Droit Européen*, for the newly founded grouping. French was the lingua franca of international diplomacy and the main working language of the European Commission and the Court of Justice, which holds its *délibéré* in French to this date. Indeed, the original European Economic Community was more a pluri- than a multinational club. In the beginning, it had four official languages (French, German, Italian, Dutch). English joined that group more than twenty years after the Schuman declaration – and it took until 1995 (!) for the number of official languages to move beyond ten.

In short, one could reasonably expect EU experts to participate in transnational debates in the main languages. Pierre Pescatore, to give just one example, published contributions in French, English and German regularly (probably there are also texts in Dutch and Italian language, which I do not master unfortunately). To be sure, English was present from the beginning and the Commission actively supported the launch of the Common Market Law Review a decade before British accession. Yet, no language was dominant. A FIDE report in German was probably understood by most participants – even if national debates on EU matters seem not to have been well-connected.

Today, the situation is quite different. Of course, there will always be prominent exceptions, but generally the

move towards English as the language of academic exchanges on European law is probably unstoppable. We may, at best, achieve some form of reflexive bilingualism, as this blog does when it aspires to become a place of 'pushed bilingualism' (my translation of 'forcierte Mehrsprachigkeit' in a German-language editorial on the future of the Verfassungsblog). Like it or not, international debates take place in English nowadays.

My experience tells me that there are at least two structural reasons supporting this trend: Firstly, we should not shy away from naming the ignorance of some (Anglo-Saxon) academics who do not master foreign languages and fail systematically to read non-English sources. Secondly, Europe's newly found linguistic diversity with 24 official languages implies less overlap. Most experts on EU law speak one or several foreign languages. Yet, their knowledge rarely coincides. At most events, a number of people do not speak French, German, Spanish, Polish or Italian – while English is the common denominator. This trend reinforces itself over the years and has probably crossed the point of no return already. English has become, like the original lingua franca, for very pragmatic reasons the language of choice of international communication.

The Place of German-Language Debates on EU Law

Koen Lenaerts, the Vice-President of the Court of Justice, may be today's equivalent of the late Pierre Pescatore. An intelligent and influential academic-turned-judge writing regularly in different languages. He is one of the very few internationally renowned authors, who has contributed to the traditional periodical *Europarecht* in recent years (on the scope of the Charter, to be precise). He is an exception, though. Few international academics make much effort to reach into German-language debates. From the reverse angle, the picture is no less dire: Reading the most influential journals on EU law one hardly finds any reference to German publications. *Europarecht*, *Juristenzeitung*, *Der Staat*, let alone *Europäische Zeitschrift für Wirtschaftsrecht* or *Die Öffentliche Verwaltung*, are rarely taken notice of outside Germany (and Austria).

That is not to say, crucially, that there is little interest in the German perspective. To the contrary, many people long for more information about the view from central Europe (think of the rulings of the *Bundesverfassungsgericht* or the success of both the Verfassungsblog and the German Law Journal). Yet, language seems to present an unsurmountable hurdle. That is not specific to Germany. The situation of publications in Italian, Dutch and Spanish is quite similar (if not worse), while some smaller jurisdictions do not have enough manpower to sustain debates about specialised questions of EU law. Even the once highly influential French discussion has lost much of its former authority. Europe may have a Commissioner for multilingualism (Androulla Vassiliou during the past 4 years, in case you hadn't heart of her), but the transnational legal debate has become very much monolingual.

I understand that supranational institutions, the Commission and the ECJ in particular, are much more diverse in their outlook and the sources they consult than the footnotes of English language journals suggest (some British colleagues may not be fully aware that consulting the latter only gives them an incomplete picture). I recognise also that the decline of multilingualism has cultural costs and reinforces the authority of Anglo-Saxon legal methods. For these reasons, it is crucial that we try to keep multilingualism alive – both in its pure form and indirectly by entering the transnational arena.

Indeed, the overall picture may be more rosy. We have compiled a list of countries of origin (in terms of institutional affiliation, not nationality) for authors to four prominent EU law journals during 2013: CML Rev., ELJ, EuConst and EL Rev. This basic empirical survey suggests that the debate in these fora is by far no dialogue among British academics (although the EU law faculty at many British universities often is a microcosm of European diversity with researchers from across the continent). Contributors from the United Kingdom constitute the single largest group, but authors from other Member States taken together account for roughly 70 % of all articles (with the exception of the European Law Review, which has more British authors). These journals may be monolingual, but they are transnational and multicultural in terms of legal traditions. Let's enrich these debates through more contributions from the geographic heart of Europe.

The Inverse Perspective: The Irrelevance of International Debates

So far, I have been deliberately one-sided by focusing on the limited impact of German-language publications on

transnational debates about EU law. Yet, there is an alternative perspective, which supports the opposite conclusion. If you consult German-language debates on European affairs, you find semi-autonomous debates (the same applies to France, Italy and Spain). Some authors consult only (or mainly) German sources. We live in a world of concentric circles and the overlap is much smaller than we think. European lawyers from Germany and elsewhere should try to bridge this gap. More overlap may enrich both national and the pan-European debate.

This phenomenon is particularly pronounced when you move beyond academia. Among practitioners, the willingness to read non-German texts is limited indeed. The Common Market Law Review is the most influential journal among practitioners in Brussels and Luxembourg – and yet you hardly find any references in German judgments (although they are generally quite eager to refer to academic literature, especially the famous commentaries). Anyone, who has published in English, will have learnt that some German colleagues working on similar topics had not even seen the piece. There are numerous articles discussing diverse questions of EU law which cite no or little English-language sources, also among younger authors.

Structurally, this disconnect hampers the effectiveness of both domestic and transnational debates. An ECJ judgment does not guarantee that the law is applied on the ground; the European debate needs to filter through into domestic circles. Conversely, national discussions have less impact if they do not reach the eyes and minds of those who do not speak German. That is another reason why the reference from Karlsruhe on the ECB bond purchases is such an important symbol. It signals to any student, researcher and citizen that the national legal order does not have an answer to every question.

How can we remedy that situation? Firstly, German academia should make an effort to participate in transnational debates. That is most evident in the field of European and international law but extends to domestic issues. In this respect, the German commentary tradition is an asset which is also appreciated in Brussels. Yet, six German language commentaries on EU primary law written mainly by academics are (more than) enough. Specialists of European law should use these ressources to participate actively in transnational debates – In their own long-term interest. Almost any public lawyer can teach the mandatory EU law class at his/her faculty. It requires some degree of specialisation, however, to engage in meaningful transnational dialogue.

Secondly, we have to find ways to link national and European debates. Notwithstanding the extra effort of bilingual publications, they are a tool to overcome the disconnect. I am convinced that German academics have much to contribute to international debates which are often hyper-specialised and lack the broader constitutional outlook of the German public law tradition. We should venture this step, even if bilingual publications are more than an act of literal translation. They require us to engage with different traditions and methodologies; we need to adapt our argument to the transnational setting. This applies also to non-German actors who would be obliged to take the German perspective into account when they respond to arguments in English-language publications by German academics. That is why Europeanisation is much more than a doctrinal phenomena. It will change our legal cultures for good.

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